

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DICK L. POFF

Claimant

VS.

IBP, INC.

Self-Insured Respondent

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Docket Nos. 250,093

ORDER

Claimant requested review of the August 22, 2003 Award by Administrative Law Judge Brad E. Avery. The Board heard oral argument on January 20, 2004.

APPEARANCES

Scott L. Johnson of Topeka, Kansas, appeared for the claimant. Gregory D. Worth of Roeland Park, Kansas, appeared for self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The claimant filed four separate workers compensation claims alleging work-related injuries on four separate dates to four different parts of his body.¹ Although all four claims were heard at one regular hearing, the Administrative Law Judge (ALJ) conducted the hearing so that all the evidence pertaining to one claim was heard and terminal dates were established before the hearing proceeded with the evidence pertaining to the next claim. The ALJ then issued four separate awards.

¹ Docket No. 233,909 alleging bilateral carpal tunnel syndrome; Docket No. 247,591 alleging varicose veins in both lower extremities; Docket No. 250,093 alleging injuries to the back, hands and fingers; and, Docket No. 270,756 alleging hearing loss in both ears.

In this docketed claim, the claimant alleged a back injury. It appears that claimant was confused when he testified at regular hearing that he injured his back loading boxes into an elevator. At his later deposition claimant clarified that his injury was to his thoracic spine which occurred while performing his work activities washing cow tails.

The ALJ found the claimant suffered a thoracic spine injury which resulted in a 5 percent functional impairment to the body as a whole.

The claimant requests review of the following issues: (1) nature and extent of claimant's disabilities; (2) whether the ALJ erred in separating each of claimant's claims rather than considering all of the claims cumulatively; and, (3) whether the ALJ erred in determining claimant was receiving retirement benefits and that the offset provisions of K.S.A. 44-501(h) would apply to a permanent total disability. Claimant contends that he is permanently and totally disabled.

The respondent requests the Board to affirm the ALJ's Award. Respondent argues that claimant filed four separate and distinct claims and that there is no basis to enter a single award determining the cumulative effect of all four distinct and separate injuries. Consequently, respondent requests the Board to likewise determine each claim separately.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant argues that the cumulative effect of the four separate injuries should have been considered and only one award entered. The Board disagrees.

Each of the alleged accidents resulted in separate and distinct injuries unrelated to the others. Nor was it alleged that the injury in a claim was the natural, direct or probable consequence of another claim. At the regular hearing on November 15, 2002, the ALJ told the parties that each claim was for a separate injury and all the evidence pertaining to each individual claim would be taken before the evidence pertaining to the next claim would be taken. The ALJ noted:

Okay. Now, as a matter of procedure, we're going to go down docket by docket and we'll need to address each issue and each docket as we go through. When you are through with the evidence in one docket, we'll close that record and then we will proceed to the next docket. These are all apparently separate or alleged separate injuries, so we'll need to address each issue individually as we go through each docket individually as we go through. Is that clear?²

² R.H. Trans. at 9-10.

No objection was made to this procedure nor was there any request to consolidate the claims for entry of a single award. The Board finds that each claim must be determined on its own merits separate from the other filed claims.

Herein, the claimant testified that he developed pain while performing his work duties washing tails. He noted that he would twist to the right and get the tail, then wash it and twist to the left to put it in a tub. The claimant reported his pain to the plant nurse and was referred to Dr. Hutchison for treatment.

Dr. Hutchison ordered claimant to undergo a week of physical therapy and released the claimant back to work. Apparently, the claimant did not receive any additional treatment for this injury. Nor did he receive any additional treatment for this condition after he quit working for respondent on June 29, 2000.

The ALJ ordered an independent medical examination of claimant by Dr. Peter V. Bieri. Dr. Bieri opined the claimant suffered a 5 percent permanent partial whole person impairment based upon his cervicothoracic injury.

At his attorney's request, the claimant was examined by Dr. Truett L. Swaim on June 19, 2001. Dr. Swaim admitted that when he rated claimant he included all the findings irrespective of what injury may have caused the condition. However, it appears that Dr. Swaim's rating for the thoracic region was a 6 percent permanent partial whole person impairment. But it was difficult to determine which specific injuries Dr. Swaim rated and in his recitation of claimant's injuries there is no mention of this particular claimed thoracic injury or treatment by Dr. Hutchison.

The ALJ adopted the rating of the independent medical examiner and the Board is not persuaded to disturb that finding.

The claimant alleged that he was permanently totally disabled. But there is no evidence that this specific injury rendered claimant unable to engage in substantial and gainful employment. The parties stipulated that this accident occurred on April 19, 1999. As previously noted, the claimant received minimal medical treatment and returned to work without restrictions as a result of this injury. Claimant quit working for respondent a little over a year later on June 29, 2000. He never required additional medical treatment nor had claimant received any additional medical treatment for his thoracic back in the approximately two years between his retirement date and the date of the regular hearing. It cannot be said this injury rendered claimant unable to engage in substantial gainful employment.

Lastly, it should be noted that the offset in K.S.A. 44-501(h) is not applicable to reduce the compensation benefits to less than the compensation benefit payable for claimant's percentage of functional impairment. Because claimant's benefit in this case is limited to his functional impairment any issues regarding retirement offsets are moot.

AWARD

WHEREFORE, it is the finding of the Board that the Award of Administrative Law Judge Brad E. Avery dated August 22, 2003, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of February 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Scott L. Johnson, Attorney for Claimant
Gregory D. Worth, Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director